SUPREME COURT, U.S.

71-264

~~No. 264~~

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

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THE DECISIONS IN FLORIDA BOARD V. MACK 401 US 960 (Cert. denied) (1971) 430 F 2d 862 (CA 5 1970) REQUIRES RECONSIDERATION OF DENIAL OF BOOTH'S PETITION FOR CERTIORARI.[1]

Petitioner respectfully moves this Court for an Order vacating its denial of his Petition for a Writ of Certiorari entered on October 26, 1966 and in support thereof states:

The three federal court rulings in each of the *Mack* and *Booth* cases reveal such a gross inconsistency in the appli-

[1] Petitioner overlooked and did not refer to either the Mack or Hazel Atlas v. Hartford cases in his original Petition or Supplementary Memos filed with this Court.

cation of federal jurisdictional principles as to require reconsideration and allowance of the Booth Petition for Certiorari. Both cases were preceded by state court suits. Each set of actions involve (a) the combination of property and personal rights under 28-1343(3) or 42-1983; (b) power of federal courts to entertain suits seeking protection of federal constitutional rights litigated in part in the state courts and (c) such power where issues primarily of a local character were presented in the state courts.

In *Mack,* however, unlike the three rulings in *Booth,* the federal courts accepted jurisdiction without regard to distinctions between property and personal rights under 1343 (3) and the application of res judicata principles. This Court by a seven to two vote apparently registered its approval of the Fifth Circuit District and Appellate Court judgments[2] when over Justice White's dissenting opinion[3] joined in by the Chief Justice, it denied an application for a writ of certiorari by the Florida Board.

The underlying essence of the *Mack* decision is that notwithstanding prior litigation between the same parties in the state courts the doors of the federal courts shall be open to litigants demonstrating flagrant violations of due process and involving a combination of property and personal rights. The Fifth Circuit and not the Seventh Circuit opinion represented controlling federal jurisdictional and constitutional principles at least until October 26, 1971. *Mack,* not *Booth,* was correctly decided by the federal courts.

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[2] The Court of Appeals' Opinion is reproduced in the Appendix.

[3] Justice White's dissenting opinion stated the Florida claim that the federal courts had violated the res judicata doctrine required granting of the Florida Board's Petition for Certiorari, 401 U.S. 960-961 (1971).

The striking similarity of the critical facts and history of the two cases would seem to impose the duty upon this Court to consider the fundamental unfairness of the opinions below to the Sanitary District's 1,000,000 taxpayers who were improperly denied a hearing on the merits in both forums. The disregard by federal courts of such grave public loss is indeed unusual particularly since "moment to the public"; *Hazel Atlas Glass Co.* v. *Hartford,* 322 US 238, 246 (1944) is also a vital consideration upon review of judgments tainted with fraud.

Though the essential facts in *Mack* are found in Mr. Justice White's dissenting opinion, 401 US 960-962 (1971) a brief comparison of the two cases is now necessary.

1. In both state and federal suits, Dr. Mack claimed Florida had illegally cancelled his right to practice dentistry. The crux of his case throughout the litigation was the grave property loss he suffered by the loss of his license.[1] However, in the state courts Mack unsuccessfully argued that the Dentistry Board denied him a fair trial and that the evidence did not support revocation of his license.[2]

2. Following the Florida Appeals court decision, Dr. Mack unsuccessfully sought a Writ of Certiorari in Florida Supreme Court. Booth like Mack did not seek certiorari from the state courts to this Court. Mack instead (like Booth), then filed a new suit in the federal district court seeking relief under 42 USC 1983. Here for the first time he argued "the proceedings before the State Board were

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[1] The Kerner opinion in Booth held he could not qualify under 1343(3) for his claims for reassessment of the rental value of district property was "a claim based on alleged property rights 440 F2 385, 387 (App. 3) though he shifted his suits to the federal courts only because he had been denied procedural due process under a rule violating the equal protection clause.

[2] See dissenting opinion of Mr. Justice White, 401 U.S. 960, 961 Mack v. Pepper, 192 So. 2nd 66, 67 (Florida Court, App. 1966).

unconstitutional in that the Board acted as both prosecutor and judge" (401 US 960, 28 L.Ed. 2nd 245, 246) (1971). Thus his federal case as approved by the District Court combined not only property damage but loss of personal due process constitutional rights within 42 USC 1983 and 28 USC 1343(3).

3. As Justice White states, the Court of Appeals rejected Mack's contentions but upheld the judgment below as the hearing utterly lacked the essentials of procedural due process. It ordered the Florida Board to hold a new hearing.

4. Justice White's dissenting opinion stated the Florida Board had argued that the res judicata doctrines had been disregarded for a federal court "may not determine constitutional issues already submitted to and determined by the state court." He also cited *Bullington*, 330 US 183, that a federal court "may not even decide (constitutional) issues which could have been but were not submitted to a state court in prior litigation" (401 US p. 961).

5. Booth's initial 1963 state court complaint on a number of grounds attempted to recover the enormously valuable public property defendants and other Sanitary District lessees had wrongfully converted into private property through their numerous 50-99 year leases. However before the final trial court judgment was entered, he moved for change of venue because of the Chancellor's relationship to the firm representing American Oil Company. Here he invoked an element of personal due process rights[1] judging also by the federal court rulings in *Mack*.

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[1] Another personal issue not yet recognized as a "right" was Petitioner's desire to restore the dignity and integrity in local government. Judge Kerner's opinion ignored Booth's personal due process and equal protection rights when he said that plaintiff's case was predicated solely upon property rights (440 F. 2d 385, 387.)

6. The Illinois Appellate Court decision (App. 26) omitted any mention of the reason for his change of venue petition and also refused to permit him to amend his pleading in that court to argue intervening facts showing that certain defendants had practiced fraud on the public and the courts. The nature and purpose of this amendment was not mentioned in the court opinion (App. 29).

7. Though Mack received a hearing on the merits before the Florida Board and in the Florida Appeals Court, no such right was accorded Petitioner and his class in the Illinois courts.

8. Booth first tested the issue of federal jurisdiction in a suit against a single lessee defendant in the state action, General Dynamics Corp. The District Court here (264 F.Supp. 465 App. 10-22), as in *Mack* upheld subject matter jurisdiction (*Mack,* 296 F.Supp. 1259 S.D. Fla., 1969).

9. General Dynamics then filed a Petition for a Writ of Mandamus to expunge the District Court's jurisdictional ruling or to require to certify jurisdictional issues subsequently argued in the *Lemont* appeal.[1] The Appeals Court rejected Dynamics Petition on February 7, 1968. (App. 23) in its entirety.

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[1]Dynamies argued Judge Will's ruling upholding jurisdiction under the due process cause has never been approved by the federal courts, stating (p. 16 Petition for Mandamus):

> "Claims of violation of Fourteenth Amendment rights under these circumstances were rejected by the United States Supreme Court in Owensboro Waterworks Co. v. Owensboro, 200 U.S. 38 (1906) and by a Court of Appeals in Otto v. Somers, 332 F. 2d 697 (6th Cir. 1964) cert. denied, 379 U.S. 1002 (1965)."

Kerner's subsequent Court of Appeals opinion relied on both decisions when it sustained respondent's claims on this issue. 440 F. 2d 385, 387. (App. 3)

10. Nine months after the Court of Appeals ruling and prior to the General Dynamics settlement in April, 1969 Booth filed his Lemont suit. The decisions below have been discussed in detail in the Petition and other memoranda filed by the several parties.

11. Petitioner finds it impossible to reconcile either the reported decisions of the Fifth Circuit Courts in *Mack* with the decisions in the *Lemont* case by the Seventh Circuit Courts. Equally impossible of reconciliation is the denial of certiorari in both cases. It would appear that consideration by this Court of its own Rule 19 would have required the issuance of a Writ in this case for the Court of Appeals' *Lemont* opinion was "in conflict with the decision of another Court of Appeals on the same matter" and the Seventh Circuit Court has "decided an important question of federal law which has not been, but should be, settled by this Court."[1] In fact though Petitioner believes Mack was correctly decided and Lemont was not, Mack presented a far stronger case for the application of the Bullington doctrine except for the fact that Mack again demonstrates that the federal courts generally do not apply the Bullington doctrine to cases such as *Mack* or *Lemont*. Neither the Court of Appeals' opinion in *Lemont* or the briefs submitted by Respondents cited other federal court decisions sustaining the application for Bullington to litigation involving the peculiar and distinguishable facts such as *Lemont*.

12. However, there were other circumstances justifying a reversal of the opinions below and the allowance of the

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[1] And see Stern-Gressman, 4th Ed. Supreme Court Practice, Sec. 4.4, p. 154-155; Sec. 4.5, p. 156-158; Sec. 4.11, 4.12, p. 167-170; 4.15, 4.16, 4.18, p. 175-180.

Writ in this case. We have earlier here noted this court's landmark decision in the *Hazel Atlas* case, 322 US 238, 246, 247. The facts indicating fraud vary from case to case. Surely Hazel Atlas and related cases demonstrate the need of early rather than belated inquiry into issues of fraud and due process adversely affecting the constitutional rights of plaintiff's class to a fair and impartial determination of such issues. Petitioner submits this is the occasion for express action by this Court to settle the confusion and differences of opinion among the several federal courts as well as litigants therein with respect to fundamental issues of property and personal rights, the application of res judicata and collateral estoppel and other basic issues presented herein determining the jurisdiction of the federal courts.

WHEREFORE, Petitioner Harry R. Booth, pro se, prays that this Honorable Court grant this Petition for Rehearing, and his Petition for a Writ of Certiorari to the Court of Appeals of the Seventh Circuit, and that it further reverse the judgments of the Court of Appeals and the District Court in the instant proceedings.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

/s/ *Harry R. Booth*
Petitioner Pro Se

APPENDIX

APPENDIX

DR. ROY F. MACK, Plaintiff-Appellee,

v.

The FLORIDA STATE BOARD OF DENTISTRY, Defendant-Appellant.

No. 28085

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

July 7, 1970.

Rehearing Denied and Rehearing En Banc Denied Aug. 17, 1970.

(430 F2 862)

Suit under Civil Rights Act and Fourteenth Amendment for restoration to plaintiff of his license to practice dentistry. The United States District Court for the Southern District of Florida, 296 F.Supp. 1259, entered judgment for plaintiff and the State Board appealed. The Court of Appeals, Coleman, Circuit Judge, held that where dentist who presided over hearing by Florida State Board of Dentistry erroneously sustained many objections of Board's attorney to evidence sought to be produced by dentist, often erroneously overruled objections from dentist's counsel and permitted one attorney for Board and one attorney for dentist to indulge in continuous personal

acrimony so that proceeding was an ungoverned confrontation, dentist was denied the admistrative hearing to which he was entitled.

Affirmed in part and in part vacated and remanded.

1. *Physicians and Surgeons* — 11(3)

Florida State Board of Dentistry, in proceeding to revoke professional license, was not limited to evidence beyond a reasonable doubt.

2. *Administrative Law and Procedure* — 472

Administrative hearings are not required to be conducted with all the formalities and strictures of a criminal case.

3. *Physicians and Surgeons* — 11(3)

Where dentist who presided over hearing of Florida State Board of Dentistry, in proceeding to revoke professional license, erroneously sustained many objections of Board's attorney to evidence sought to be produced by dentist, often erroneously overruled objections from dentist's counsel and permitted one attorney for Board and one attorney for dentist to indulge in continuous personal acrimony so that proceeding was an ungoverned confrontation, dentist was denied the administrative hearing to which he was entitled.

4. *Physicians and Surgeons* — 11(3)

Where there was probable cause for bringing charges of professional misconduct against dentist, suspension of his license pending hearing on charges was neither unjust nor inequitable.

Edward H. Robinson, Richard L. Randle, Robinson & Randle, Jacksonville, Fla., for defendant-appellant.

Horton & Schwartz, Alan R. Schwartz, Malloy H. Horton, Miami, Fla., for plaintiff-appellee.

Before BELL, COLEMAN, and AINSWORTH, Circuit Judges.

COLEMAN, Circuit Judge:

Upon complaint, notice, and hearing the Florida State Board of Dentistry revoked the license of Dr. Roy F. Mack to practice in that State. Without filing any specific findings of fact, the Board held Dr. Mack to have been guilty of causing in the yellow pages of the Greater Miami Tele. Directory (p. 863) a listing for Palm Springs General Hospital with his private number, of advertising professional services at a greatly reduced cost to certain members of trade unions, and of taking improper personal liberties with female patients which would bring discredit upon the dental profession.

Dr. Mack first obtained review of the proceedings by the Fourth Florida District Court of Appeals. He argued that the procedure before the Dental Board was such that he was deprived of a fair and impartial hearing and that the Board's findings were not supported by substantial competent evidence. The Florida Court of Appeals, with no discussion of the events at the "hearing" held these contentions to be without merit and denied relief, Mack v. Pepper, 192 So.2d 66 (1966). The Supreme Court of Florida denied certiorari without written opinion.

Dr. Mack then filed an original suit in the United States District Court for the Southern District of Florida under the Civil Rights Act of 1871, 42 U.S.C.A. § 1983, and the

Fourteenth Amendment to the Federal Constitution, seeking the restoration of his license.

The opinion of the District Court disposing of the case is published, 296 F. Supp. 1259 (1968).

There is no point in paraphrasing the opinion here. Suffice it to say, the District Court decided two questions.

[1] First, it held that the Board in proceeding to revoke a professional license was not limited to evidence beyond a reasonable doubt. With this we definitely agree, see 296 F. Supp. at 1262.

Second, the District Court held that "the mixing of functions of the Dental Board [investigating complaints, weighing the reports, filing charges, holding hearings, and deciding the merits (with its attorney conducting the "prosecution")] constituted a deprivation of procedural due process in contravention of the Fourteenth Amendment. For the reasons hereinafter set forth we modify the decision of the District Court on this question and do not decide issues not necessary to the decision of the controversy.

This Court has made an independent examination of the transcript [518 pages] of the purported hearing given Dr. Mack by the Dental Board on February 18, 1966. The hearing began at 9 o'clock in the morning and concluded at 11:35 o'clock that night. The Board declined to continue the hearings into the next day or to adjourn to some other day because that would inconvenience its members. It declined to leave the record open to allow the testimony of a prominent medical doctor who was temporarily absent in Atlanta. It declined to leave the record open to allow an examination by a urologist to determine whether

Dr. Mack was impotent, which had become the paramount issue in the hearing.

The Dentist who presided over the hearing frankly stated that he was not a lawyer and was unfamiliar with the rules of evidence. This ordinarily would be of no particular moment, but Dr. Mack was represented by counsel and dozens of evidentiary questions arose. The chairman sustained at least ninety per cent of objections raised by its attorney, many times erroneously. He over-ruled about the same proportion of objections from Dr. Mack's counsel, often erroneously.

Dr. James Chimerakis, a licensed osteopathic physician, testified that he had examined Dr. Mack and found him to be impotent as the result of a rare disease. He produced x-rays of Dr. Mack which he had taken and which his assistant had developed. He said he knew of his own knowledge that the x-rays were of Dr. Mack. The Board excluded them because the written identification appeared on the envelope rather than on the film. The Board said the envelope might have been switched.

Most seriously of all, from the beginning of the "hearing" until its bitter end, one of the attorneys for the Board and one of the attorneys for Dr. Mack (864) indulged in continuous personal acrimony, charges and counter charges, attacking each other with unconcealed venom, both as to their personal attributes and their professional competency. An experienced judge would have nipped this in the bud and, if continued, these attorneys would no doubt have swiftly found themselves the objects of discipline. The chairman, of course, did not know how to cope with this and made a very feeble effort to do so. It is no excuse to say that it was provoked by either side.

To get down to brass tacks, this was not a hearing. It was an ungoverned confrontation. We hold that Dr. Mack, as a matter of fact, has not had a hearing in that sense required of anything which claims to be an administrative hearing as known to the jurisprudence of this Country.

In so holding, we imply no affirmative criticism of the Board Members. They were not lawyers. Their mistake was in not selecting some competent attorney as a presiding officer, preferably acceptable to both sides, who could have kept the hearing within due bounds while the Board Members heard the evidence.

[2, 3] We do not intimate that such a procedure is Constitutionally required. We suggest it only as one way by which this situation may be avoided a second time around. Neither do we insinuate that administrative hearings must be conducted with all the formalities and strictures of a criminal case. They do not. A man who is about to lose a professional license which he has held for twenty years, however, is entitled to develop his defense in freedom from what took place in this case.

The judgment of the District Court will be affirmed on the sole ground that Dr. Mack has not had a hearing on the charges preferred against him. The case will be remanded to the District Court so that the Florida State Dental Board may, if it wishes, conduct a lawful hearing within not more than sixty days after the receipt of our mandate in the District Court.

[4] We indicate no view of the merits of this case. On the record as a whole it is seen that there was probable cause for the bringing of the charges. We hold, therefore, that a suspension of the license pending a hearing is neither unjust nor inequitable. The license will remain suspended

as ordered by the District Court until a hearing can be held or until the expiration of the sixty day period as herein provided.

The District Court will give no directions to the Florida State Dental Board as to the modus operandi of its hearing. That is the responsibility of the Board and a duty for it to discharge, within the requirements of the Constitution.

As to a hearing for Dr. Mack, the standard of proof required, and the suspension of the dental license pending a hearing, as hereinabove set forth, the judgment of the District Court is affirmed.

In all other particulars, the judgment of the District Court is vacated.

The case will be remanded for further proceedings not inconsistent herewith.

Affirmed in part, and in part vacated, and remanded.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 23 Federal Rules of Appellate Procedure, Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.